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GOPINATHAN SUBRAMANIAM

v.

TIMBALAN MENTERI DALAM NEGERI & ORS

*b*HIGH COURT MALAYA, KUALA LUMPUR
AUGUSTINE PAUL J
[CRIMINAL APPLICATION NO: 44-33-99]
16 NOVEMBER 1999*c*

CRIMINAL PROCEDURE: *Habeas corpus - Detention of drug addict - Recommendation of rehabilitation officer - Whether conclusive - Whether may be rebutted - Whether mandatory for magistrate to comply with recommendation - Detainee not a drug dependant according to s. 2 Drug Dependants (Treatment and Rehabilitation) Act 1983 - Rehabilitation officer nonetheless recommends order of detention - Whether recommendation wrong in law - Whether magistrate may ignore recommendation - Drug Dependants (Treatment and Rehabilitation) Act 1983, s. 6(1)*

*d**e*

CRIMINAL PROCEDURE: *Habeas corpus - Detention of drug addict - Occasional drug user - Whether a drug dependant - Whether order detaining occasional drug user under s. 6(1) Drug Dependants (Treatment and Rehabilitation) Act 1983 wrong in law*

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CRIMINAL LAW: *Drug Dependants (Treatment and Rehabilitation) Act 1983 - Section 2 - Drug dependant - Occasional drug user - Whether a drug dependant - Whether order detaining occasional drug user under s. 6(1) Drug Dependants (Treatment and Rehabilitation) Act 1983 wrong in law*

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EVIDENCE: *Documentary evidence - Public document - Whether contents may be rebutted - Whether document must be accessible to public to be classified as public document - Difference between law here and English law - Evidence Act 1950, ss. 74 & 76*

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The applicant was held to be a drug dependant and was ordered by a magistrate to be admitted to a rehabilitation centre pursuant to s. 6(1)(a) of the Drug Dependants (Treatment and Rehabilitation) Act 1983 ('the Act'). This was the applicant's application for a writ of *habeas corpus* to be released forthwith.

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In making the order, the learned magistrate had acted in accordance with the recommendation in the rehabilitation officer's report. The applicant contended that the magistrate ought not to have accepted the recommendation because the report itself did not support the making of such a recommendation. The applicant referred to the finding in the report that the applicant was only an

occasional drug user to contend that the findings did not show that he was a drug dependant as defined by s. 2 of the Act. In reply, the respondent argued that the applicant had been certified to be a drug dependant by a government medical officer. The respondent further submitted that the report is independent of the certification of the government medical officer and should not be considered to determine whether the applicant is a drug dependant. The issue before the court was whether the magistrate is bound by the recommendation.

Held:

[1] Upon a certification by a government medical officer or registered medical practitioner that a person is a drug dependant, that person shall be produced before a magistrate. Thus, the certification is only authority for producing a person before a magistrate. The magistrate shall then make an order under s. 6 of the Act upon the recommendation of the rehabilitation officer. The recommendation therefore plays a dominant role as it is based on this that the magistrate makes the order. The magistrate must make an order under s. 6(1)(a) or (b) of the Act upon a consideration of the recommendation.

[2a] As the report and the certificate were prepared by public servants in the discharge of their official duties, they are public documents as defined in s. 74 of the Evidence Act 1950 and are admissible under s. 35 of that Act. However, the admissibility of a document is one thing and its probative value quite another. A public document is *prima facie* proof of its contents but it may be rebutted by other evidence.

[2b] The recommendation is not admissible under s. 35 of the Evidence Act 1950 as it is an inference drawn by the rehabilitation officer based on enquiries conducted by him. However, the recommendation has been made admissible statutorily by s. 6 of the Act.

[3] Upon a consideration of the recommendation, a magistrate shall make one of two orders. This makes it patent that in making one of the two orders, the magistrate is not bound to follow the recommendation of the rehabilitation officer. If the rehabilitation officer recommends an order under s. 6(1)(a) of the Act, the magistrate has the discretion to make an order under s. 6(1)(b) of the Act and *vice versa*. This results in the recommendation being ignored by the magistrate in an appropriate case. The recommendation made by the rehabilitation officer is therefore not conclusive and thus other credible evidence is admissible to challenge the recommendation.

[4] In cases relating to detention without trial, as in cases of this nature, the applicable law must be strictly construed and in case of any doubt

- a* the court should lean in favour of the subject. Accordingly, the certificate and the recommendation must comply with the statutory requirements and may be rejected if there is no such compliance.

- b* [5] Section 6 of the Act contemplates the making of a recommendation only in the case of a drug dependant as defined by the Act. A drug dependant is defined in the Act as a person who, *inter alia*, has the "...compulsion to take the drug on a continuous or periodic basis...". This certainly does not include a person who takes drugs once in a while. And it is the finding of the rehabilitation officer that the applicant takes drugs once in a while. This negates the inference that the applicant has a compulsion to take the drug on a continuous or periodic basis. The *prima facie* evidence that the applicant is a drug dependant has therefore been rebutted. The applicant is thus not a drug dependant based on the report itself. The recommendation made by the rehabilitation officer is wrong in law and the learned magistrate ought not to have acted on it.

- d* ***Per curiam:***

- Section 76 of the Evidence Act 1950 contemplates a class of public documents which persons do not have the right to inspect with the result that it does not require the condition of public access to the document to render it a public one. Even when a right to inspect is not permitted, a document may be a public document under our law.

[Application allowed; applicant ordered to be released forthwith.]

Case(s) referred to:

- f* Andrew Thamboosamy v. Superintendent of Pudu Prisons, Kuala Lumpur [1976] 2 MLJ 156 (*refd*)
Anthony Gomez v. Ketua Polis Daerah Kuantan [1977] 2 MLJ 24 (*refd*)
Baldeo Das v. Gobind Das ILR 36 All 161 (*refd*)
Buddhadasa v. Mahendran [1956] 58 NLR 8 (*fol*)
Chua Lee Huat v. Timbalan Menteri Hal Ehwal Dalam Negeri, Malaysia [1997] 2 CLJ Supp 18 (*refd*)
- g* Doe v. Andrews [1850] 15 QB 756 (*refd*)
Ghanava v. Mehtab AIR 1934 L 890 (*refd*)
Juddery v. Lindsay [1976] 8 ACTR 1 (*refd*)
Kamaruzamman Yahya v. Menteri Hal Ehwal Dalam Negeri, Malaysia [1997] 5 CLJ 290 (*fol*)
- h* Krishna Nanda v. The State AIR [1958] Pat 166 (*refd*)
Kumar Digambar Singh v. Ahmed Sayeed Khan AIR 1914 PC 11 (*refd*)
Lekhraj Kuer v. Mahpal Singh ILR 5 Cal 744 (*refd*)
Menteri Hal Ehwal Dalam Negeri & Anor v. Lee Gee Lam and another application [1993] 3 MLJ 673 (*refd*)
- i* PP v. Koh Yoke Koon [1988] 2 MLJ 301 (*refd*)
Pramanik v. Ghose AIR [1940] Cal 187 (*refd*)

Rasipuran UMS Ltd v. Commissioner of Income Tax AIR [1957] Mad 151 (**refd**) **a**
Re Datuk James Wong Kim Min [1976] 2 MLJ 245 (**refd**)
Re Warren [1870] 4 SALR 25 (**refd**)
Saxe v. Kellett [1970] VR 600 (**refd**)
State of Bihar v. Radha Krishna Singh AIR [1983] SC 684 (**refd**)
Sturla v. Freccia [1880] 5 AC 623 (**dist**)
Union of India v. Nand Kishore AIR [1966] HP 54 (**refd**) **b**

Legislation referred to:

Drug Dependants (Treatment and Rehabilitation) Act 1983, ss. 2, 6(1)(a), (b)
Evidence Act 1950, ss. 35, 74, 76

Other source(s) referred to:

Documentary Evidence in Australia, RA Brown, p 67 **c**

For the applicant - Harcharanjit Singh; M/s Harcharanjit Singh & Assoc

For the respondents - Mohd Fauzi Mohd Nasir; FC

Reported by S Dharmendran **d**

JUDGMENT

Augustine Paul J:

By this notice of motion dated 19 August 1999 Gopinathan a/l Subramaniam (“the applicant”) prayed for an order that a writ of *habeas corpus* be issued to the respondents to produce him before this court to be released. The applicant had been ordered to be detained for a period of two years on 19 March 1999 by the learned magistrate, Kuala Kubu Bharu at the Pusat Serenti Raub, Pahang in accordance with s. 6(1)(a) of the Drug Dependants (Treatment and Rehabilitation) Act 1983 (“the Act”). Section 6 of the Act shall hereafter be referred to as “the section”. The applicant had been certified to be a drug dependant pursuant to a certificate (“the certificate”) issued by a government medical officer in the prescribed form, the material parts of which read as follows: **e**

Saya, DR. SYED MOHD REDHA BIN SYED NASIR seorang *pegawai perubatan kerajaan/pengamal perubatan berdaftar, setelah menjalankan ujian-ujian yang perlu ke atas GOPINATHAN A/L SUBRAMANIAM Kad Pengenalan No 790327-14-5551 berumur 20 tahun yang beralamat di NO. 20 KG. SRI TERATAI, RAWANG. memperakui bahawa dia *ialah /xxxx seorang penagih dadah mengikut pengertian Akta. **Dadah/dadah-dadah berbahaya yang digunakan yang menyebabkan dia menjadi seorang penagih dadah ialah CANNABIS **f**

In making the order the learned magistrate had acted in accordance with the recommendation (“the recommendation”) in para. 4 of the report (“the report”) of the rehabilitation officer which reads as follows: **g**

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a 4. SYOR PEGAWAI PEMULIHAN

Adalah disyorkan supaya penama dimasukkan ke dalam pusat pemulihan selama dua thn dan kemudian menjalani perintah pengawasan polis selama dua tahun mengikut Seksyen 6(1)(a) Akta Penagih Dadah 1983 (Pindaan) 1998.

b In his argument before me learned counsel for the applicant contended, *inter alia*, that the learned magistrate erred in accepting the recommendation as it did not take relevant matters into consideration. Learned counsel said that the recommendation that the applicant be detained for a period of two years pursuant to sub-s. 6(1)(a) of the section is not supported by the following extracts from the report:

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2.4 Rekod Penggunaan Dadah

2.4.1 Jenis Dadah : Ganja

2.4.2 Lama Menggunakan Dadah : 1 thn

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Tarikh Mula: 1998

2.4.3 Cara Pengambilan Dadah : Balut

2.4.4 Kekerapan Menggunakan Dadah :
Sekali sekala

2.4.5 Perbelanjaan Menggunakan Dadah :

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3. Rumusan Di Atas Keseluruhan Latar

Belakang Penagih : (Untuk menentukan cara pemulihan yang sesuai)

Penama berumur 20 thn, masih bujang dan kini tinggal bersama ibunya.

Penama bekerja sebagai pemandu lori dengan pendapatan RM25/hari.

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Penama mengaku menghisap dadah jenis ganja dengan cara balut. Penama telah terlibat dengan dadah sejak tahun 1997. Kekerapan menghisap adalah sekali sekala.

Penama kini dalam perintah pengawasan dari tempoh 3/6/1997 hingga 3/6/1999 oleh Mahkamah Majistret Ampang. Penama gagal hadir melapur diri langsung sepanjang tempoh tersebut.

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Learned counsel concluded by saying that these findings of the rehabilitation officer show that the applicant is not a drug dependant as defined by s. 2 of the Act as follows:

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‘drug dependant’ means a person who through the use of any dangerous drug undergoes a psychic and sometimes physical state which is characterised by behavioural and other responses including the compulsion to take the drug on a continuous or periodic basis in order to experience its psychic effect and to avoid the discomfort of its absence;

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In his reply the learned senior federal counsel said that the applicant has been certified to be a drug dependant by a government medical officer after the

necessary tests were carried out. He added that the report is independent of the certification of the government medical officer and should not be considered to determine whether the applicant is a drug dependant. The object of the report, he said, is only for the purpose of making a recommendation to the magistrate which he followed. Accordingly, the learned magistrate had not erred in making the order. **a**

As the principal complaint of the applicant is that the order made by the learned magistrate is wrong in law it is necessary to set out the section under which he made the order. It reads as follows:

6.(1) Where a person who has undergone the tests referred to in section 3 or 4 and, in consequence of such tests, is certified by a government medical officer or a registered medical practitioner to be a drug dependant, the officer shall produce him, or cause him to appear before a Magistrate, and the Magistrate shall upon the recommendation of a Rehabilitation Officer and after giving such person an opportunity to make representations – **c**

- (a) order such person to undergo treatment and rehabilitation at a rehabilitation Centre specified in the order for a period of two years and thereafter to undergo supervision by an officer at the place specified in the order for a period of two years; or **d**
- (b) order such person to undergo supervision by an officer at the place specified in the order for a period of not less than two and not more than three years. **e**

In order to make a ruling on the rival contentions raised by both parties it is necessary to consider the nature and effect of the documents referred to in the section. They are: **f**

- (a) a certification by a government medical officer or registered medical practitioner that a person is a drug dependant; and
- (b) the recommendation by a rehabilitation officer. **g**

Upon a certification by a government medical officer or registered medical practitioner that a person is a drug dependant that person shall be produced before a magistrate. Thus the certification is only authority for producing a person before a magistrate. The magistrate shall then make an order under the section upon the recommendation of the rehabilitation officer. It follows that the document that the magistrate considers in making the appropriate order is the recommendation. It is therefore implicit that in making the recommendation the rehabilitation officer will take into account the certificate issued by the medical officer. I venture to suggest that the certificate by the medical officer will be based on physical tests carried out by him while a **h**

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- a* rehabilitation officer's recommendation will have the added psychological report on the person based on inquiries made. The recommendation of the rehabilitation officer therefore plays a dominant role as it is based on this that the magistrate makes the order. The magistrate must make an order under sub-s. (1)(a) or (b) of the section upon a consideration of the recommendation.
- b* The argument advanced by both parties depends on whether the magistrate is bound by the recommendation.

That leads to the question of whether the certificate and the recommendation which comes with the report can be challenged. This would depend on the rules of relevancy of the certificate, the report and the recommendation incorporated into it.

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- As the report and the certificate were prepared by public servants in the discharge of their official duties they are public documents as defined in s. 74 of the Evidence Act 1950 ("s. 74"). I interpolate to add that our definition of a "public document" is wider than the English law definition. In *Sturla v. Freccia* [1880] 5 AC 623 Lord Blackburn, in defining a "public document" under English law, said at p 643:
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But it must be a public document, and it must be made by a public officer. I understand a public document there to mean a document that is made for the purpose of the public making use of it, and being able to refer to it. It is meant to be where there is a judicial or quasi-judicial duty to inquire I think the very object of it must be that it should be made for the purpose of being kept public, so that the persons concerned in it may have access to it afterwards.

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- f* The *dictum* of Lord Blackburn received attention in *Buddhadasa v. Mahendran* [1956] 58 NLR 8, a Sri Lanka case where the law relating to public documents is similar to ours. In commenting on the distinction in this area of the law between the English and the Sri Lankan law Weerasooriya J said at pp. 11 – 12:

- g* The conception of a public document in English law and our law is, therefore, fundamentally different, and in determining whether under our law a person has a right of inspection of a public document it would, in the absence of statutory provision conferring such a right, be unsafe to adopt the criterion of the English Common Law

- h* It must be noted that s. 76 of the Evidence Act 1950 ("s. 76") which requires certified copies to be given of public documents applies only to documents " ... which any person has a right to inspect". It has been held that the right to obtain certified copies depends on the right to inspect (see *Rasipuram UMS Ltd v. Commissioner of Income Tax* AIR 1957 Mad 151; *Pramanik v. Ghose* AIR 1940 Cal 187). This right may be conferred by statute or may even arise
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when a person has an interest in it (see *Anthony Gomez v. Ketua Polis Daerah Kuantan* [1977] 2 MLJ 24). Section 76 therefore contemplates a class of public documents which persons do not have the right to inspect with the result that it does not require the condition of public access to the document to render it a public one as enunciated in *Sturla v. Freccia* [1880] 5 AC 623. It follows that even when a right to inspect is not permitted a document may be a public document under our law. Thus the definition of “public document” in s. 74 does not recognise the reason given by Lord Blackburn as a basic condition for public documents.

The admissibility of non-judicial public documents is governed by, *inter alia*, s. 35 of the Evidence Act 1950 (“s. 35”) which reads as follows:

An entry in any public or other official book, register or record, stating a fact in issue and made by a public servant in the discharge of his official duty or by any other person in performance of a duty specially enjoined by the law of the country in which the book, register or record is kept, is itself a relevant fact.

The admissibility of documents under s. 35 does not depend upon personal knowledge of their maker (see *Doe v. Andrews* [1850] 15 QB 756). It must be remembered that admissibility of a document is one thing and its probative value quite another – these two aspects cannot be combined. A document may be admissible and yet may not carry any conviction and the weight of its probative value may be nil (see *State of Bihar v. Radha Krishna Singh* AIR 1983 SC 684). With regard to the probative value of public documents I refer to *Lekhranj Kuer v. Mahpal Singh* ILR 5 Cal 744 where their Lordships of the Privy Council observed at p. 752:

When documents are found to be recorded as being properly made up, and when they are found to be acted upon as authentic records, the rule of law is to presume that everything had been rightly done in their preparation, unless the contrary appears. The mere fact then that the settlement records of this Province were prepared and attested by officers subordinate to the Settlement Officer, and not by the Settlement Officer in person, cannot be accepted as in any way invalidating the records themselves.

A public document is therefore *prima facie* proof of its contents but may be rebutted by other evidence (see *Kumar Digambar Singh v. Ahmed Sayeed Khan* AIR 1914 PC 11). This is succinctly explained by R A Brown in his book entitled *Documentary Evidence in Australia* at p. 67 in the following words:

As a general principle, a public document produced from proper custody, or a certified copy thereof, is evidence of its contents (see *Wilton & Co v. Phillips* [1903] 19 TLR 390). There is no need to provide other verification as to the accuracy of the documents’ contents, although they can be impeached by other evidence (see *Irish Society v. Bishop of Derry* [1846] 12 CI & F 641; 6 ER

a 1561). In keeping with the usual approach to documentary evidence, the fact that a public document can readily be admitted in evidence should have little bearing on the weight that may ultimately be attached to the material it contains by the court. In *Wilton & Co v. Phillips* [1903] 19 TLR 390, Phillimore J rather bluntly stated:

b A public document coming from the proper place or a certified copy of it is sufficient proof of every particular stated in it.

Although this statement would appear to place considerable evidentiary weight on the contents of a public document, it is quite clear that when his Lordship used the phrase ‘sufficient proof’ he meant nothing more than ‘sufficient in the absence of other credible evidence to the contrary’, and even this restriction overstates the evidentiary value of such documents (see *Re Stollery; Weir v Treasury Solicitor* [1926] Ch 284 (CA)).

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Thus the certificate will be of little evidentiary value if there is other evidence to rebut what it asserts. As Blackburn J said in *Juddery v. Lindsay* [1976] 8 ACTR 1:

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By their nature, certificates cannot be weighed. They say nothing except the facts which they literally record. There may be an inference which the statute allows to be drawn from those facts, but where there is other credible evidence on the issue to which they relate, that inference cannot be drawn, because the other evidence can be weighed and the certificate cannot. The certificate then says nothing of any weight on the issue to which the statutory inference relates.

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Such other evidence may be adduced by the party prosecuted or from the evidence tendered by the prosecution itself. This was made clear by Anderson J in *Saxe v. Kellett* [1970] VR 600 at p. 602:

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When the defence is entered upon and there is other evidence before the court besides the certificate – whether it comes solely from the defendant’s witnesses, or from evidence which may have been available to the defendant in the course of the informant’s case, is immaterial – when there is further evidence besides the certificate, the certificate loses much of its strength and force.

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Having dealt with the law relating to s. 35 and the evidentiary value of documents admitted thereunder I shall now consider the admissibility of the report, the certificate and the recommendation under that section. The report contains the result of investigations carried out by the rehabilitation officer.

h Although s. 35 refers to a book, register or other official record it has been held that that section also applies to a report if it is proved to have been prepared by a public servant in the discharge of his official duty or by another person in the performance of a legal duty (see *Krishna Nanda v. The State* AIR 1958 Pat 166; *Baldeo Das v. Gobind Das* ILR 36 All 161). Thus the report, being a document prepared by a public servant in the discharge of his

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official duty, is admissible under s. 35. The certificate is also admissible on similar principles. Where a report is prepared by a responsible officer based on investigations by him and has a statutory flavour in that it is given not merely by an administrative officer but under the authority of a statute, its probative value would indeed be very high so as to be entitled to great weight (see *State of Bihar v. Radha Singh* AIR 1983 SC 684). However, as I have mentioned earlier, these documents can be rebutted by other evidence. The admissibility of the recommendation which is part of the report is another matter as it is an expression of an opinion. It has been held that the words “an entry” in s. 35 do not apply to the opinions of public servants based on, or inferences drawn from allegations made before them in the course of enquiries, but are confined only to such statements of facts in issue or relevant facts as are made by the public servants concerned in the course of their official duty (see *Ghanava v. Mehtab* AIR 1934 L 890; *Union of India v. Nand Kishore* AIR 1966 HP 54). The recommendation is therefore not admissible under s. 35 as it is an inference drawn by the rehabilitation officer based on enquiries conducted by him. Be that as it may, the recommendation has been made admissible statutorily by the section. So its admissibility creates no problem. With regard to its probative value, I shall consider whether the section itself makes the recommendation conclusive in which event it cannot be challenged. When a document is made conclusive evidence of some fact, it is clear that the legislative intention is that the documents should absolutely settle that fact for all purposes, so that evidence in contradiction of the documented fact is rendered irrelevant (see *Re Warren* [1870] 4 SALR 25). The conclusiveness of the recommendation will depend upon whether the magistrate is bound to follow it. If the magistrate is bound to follow it then it cannot be challenged. In that event the argument advanced by learned counsel for the applicant cannot be sustained as the magistrate will be obliged to follow the recommendation. A reading of the section reveals that upon a consideration of the recommendation a magistrate shall make one of two orders. This makes it patent that in making one of the two orders the magistrate is not bound to follow the recommendation of the rehabilitation officer. This means that if the rehabilitation officer recommends an order under sub-s. 1(a) the magistrate has the discretion to make an order under sub-s. 1(b) of the section and *vice versa*. This results in the recommendation being ignored by the magistrate in an appropriate case. The recommendation made by the rehabilitation officer is therefore not conclusive. Thus in the absence of the section making the recommendation conclusive other credible evidence is admissible to challenge the recommendation. In any event it is settled law that in cases relating to detention without trial, as in cases of this nature, the applicable law must be strictly construed and in case of any doubt the court should lean in favour of the subject (see *Andrew Thamboosamy v.*

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a *Superintendent of Pudu Prisons, Kuala Lumpur* [1976] 2 MLJ 156; *PP v. Koh Yoke Koon* [1988] 2 MLJ 301). In this regard reference may be made to *Re Datuk James Wong Kim Min* [1976] 2 MLJ 245 where Lee Hun Hoe CJ (Borneo) said at p. 251:

b The material provisions of the law authorising detention without trial must be strictly construed Where the detention cannot be held to be in accordance with the procedure established by the law, the detention is bad and the person detained is entitled to be released forthwith.

Accordingly, the certificate and the recommendation must comply with the statutory requirements and may be rejected if there is no such compliance as illustrated by *Kamaruzamman bin Yahya v. Menteri Hal Ehwal Dalam Negeri, Malaysia* [1997] 5 CLJ 290; [1997] 5 MLJ 256.

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d The section contemplates the making of a recommendation only in the case of a drug dependant as defined by the Act. A drug dependant is defined in the Act as a person who, *inter alia*, has the “ ... compulsion to take the drug on a continuous or periodic basis ... ”. This certainly does not include a person who takes drugs once in a while. And it is the finding of the rehabilitation officer that the applicant takes drugs once in a while. This negates the inference that the applicant has a compulsion to take the drug on a continuous or periodic basis. The *prima facie* evidence that the applicant is a drug dependant has therefore been rebutted. The applicant is thus not a drug dependant based on the report itself. The result is that the certificate loses much of its strength and force. In the premises the recommendation made by the rehabilitation officer is wrong in law and the learned magistrate ought not to have acted on it. He has acted in a mechanical manner without applying his mind to the facts before making the order. This makes the order liable to be set aside and the applicant set free (see *Menteri Hal Ehwal Dalam Negeri & Anor v. Lee Gee Lam and another application* [1993] 3 MLJ 673; *Chua Lee Huat v. Timbalan Menteri Hal Ehwal Dalam Negeri, Malaysia* [1997] 2 CLJ 18; [1997] 2 MLJ 395). Accordingly, I allowed the application made by

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